

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Appellate Advisory Committee
Hon. Kathryn Doi Todd, Chair
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DATE: September 18, 2007

SUBJECT: Appellate Procedure: Petitions for Writs of Supersedeas (amend Cal. Rules of Court, rule 8.112) (Action Required)

Issue Statement

Rule 8.112 addresses petitions for writs of supersedeas, which are petitions requesting that the Court of Appeal stay the enforcement of a trial court judgment or order pending a decision on an appeal of that judgment or order. To show the court that issuing a writ of supersedeas is justified, the appellant/petitioner must show, among other things, a probability that he or she will succeed on the merits of the appeal. Sometimes, however, when the record on appeal has not yet been filed, the petition does not include sufficient information for the court to determine whether issuance of the writ is justified.

Recommendation

The Appellate Advisory Committee recommends that the Judicial Council amend rule 8.112, effective January 1, 2008, to clarify the record that must be filed with a petition for a writ of supersedeas when the record on appeal has not yet been filed by:

1. Expanding the documents that must be filed with the petition to include any application for a stay in the trial court, any opposition to such an application, and any other document from the trial court proceedings necessary for proper consideration of the petition; and
2. Providing that the statement of the case that must be included in the petition must be sufficient to show that the petitioner will raise substantial issues on appeal and must include a fair summary of the issues likely to be raised on appeal and any statement by the trial court concerning its rulings relating to these issues.

The text of the proposed amendments to the rules is attached at pages 4–5.

Rationale for Recommendation

When the record on appeal has already been filed at the time a petition for writ of supersedeas is filed, the court can review that record to help determine whether the appellant/petitioner is likely to succeed on the merits of the appeal. Petitions for writs of supersedeas are frequently filed before the record on appeal is filed, however. Under rule 8.112, when the record has not yet been filed, the petition for the writ of supersedeas must include the judgment or order being appealed, the notice of appeal, and a statement of the case that includes a summary of the material facts. Sometimes, however, these documents and the statement provided by the appellant/petitioner do not include sufficient information for the court to determine whether issuance of the writ is justified.

This amendment is intended to help ensure that the reviewing court receives sufficient information with a petition for a writ of supersedeas to properly determine whether to issue the writ. The amendment would require that in addition to providing copies of the judgment or order being appealed and the notice of appeal, the appellant/petitioner also provide copies of any application for a stay in the trial court, any opposition to such an application, and any other document necessary for proper consideration of the petition. The amendment would also clarify that the statement of the case provided by the petitioner/appellant must be sufficient to show that the petitioner will raise substantial issues on appeal. In addition, similar to the requirements for other writ petitions under rule 8.490 when a reporter’s transcript is not available, this proposal would require that the petition include a fair summary not only of the facts, but also of the issues likely to be raised on appeal and any statement by the trial court concerning its rulings relating to these issues.

Alternative Actions Considered

The committee considered and specifically sought commentator’s views about whether the term “petition for writ of supersedeas” should be replaced with the term “request for a stay.” Only one commentator, the State Bar Committee on Appellate Courts, provided any input on this issue. That committee pointed out that such a change in terminology would also require amendments to rule 8.116, which refers separately to “requests for a stay” and “writs of supersedeas.” Based on this comment and the absence of any other input on this issue, the committee ultimately decided not to recommend changing the term “petition for writ of supersedeas” at this time.

Comments From Interested Parties

These proposed amendments were circulated as part of the spring 2007 comment cycle. Nine individuals or organizations submitted comments on this proposal. Five commentators agreed with the proposal and four agreed with the proposal if amended. The full text of the comments received and the committee’s responses is attached at pages 6–11.

Three of the commentators who suggested amending the proposal were concerned that the documents being provided to the court under the proposal might be too voluminous to simply attach to the petition. All three commentators suggested that the rule should permit the documents to be filed as a separate compilation accompanying the petition. The California Appellate Court Clerks' Association further suggested that the documents should be required to be in the same format as documents attached to petitions for writs of mandate, prohibition, or certiorari under rule 8.490. Rule 8.490 allows supporting documents to such writ petitions to be attached to the end of the petition or bound together in a separate volumes not exceeding 300 pages and also requires that the documents be consecutively numbered, index-tabbed, and begin with a table of contents. The committee agreed with these suggestions; they believed it would be helpful to both litigants and the courts to clarify that documents accompanying petitions for writs of supersedeas be in the same format as documents accompanying other writ petitions. Based on these comments, the committee amended its proposal to incorporate language, modeled on rule 8.490, permitting the documents to either be attached to the end of the petition or bound together in a separate volume accompanying the petition and requiring that the documents be consecutively numbered, index-tabbed, and begin with a table of contents.

Implementation Requirements and Costs

These amendments may increase the length of petitions for writs of supersedeas when the record on appeal has not yet been filed, which may result in small increases in preparation costs for petitioners. Clarifying the record that must be filed with these petitions, however, should improve the courts' ability to consider the merits of these petitions.

Attachments

Rule 8.112 of the California Rules of Court is amended, effective January 1, 2008, to read:

Rule 8.112. Petition for writ of supersedeas

(a) Petition

(1)–(3) * * *

(4) If the record has not been filed in the reviewing court,:

(A) The petition must include: a statement of the case sufficient to show that the petitioner will raise substantial issues on appeal, including a fair summary of the material facts, the issues that are likely to be raised on appeal, and any oral statement by the court supporting its rulings related to these issues.

(B) The petitioner must file the following documents with the petition:

~~(A)~~(i) The judgment or order, showing its date of entry;

~~(B)~~(ii) The notice of appeal, showing its date of filing; ~~and~~

(iii) Any application for a stay filed in the trial court and any opposition to that application; and

(iv) Any other document from the trial court proceeding that is necessary for proper consideration of the petition.

(C) ~~A statement of the case, including a summary of the material facts. The documents listed in (B) must comply with the following requirements:~~

(i) They must be bound together at the end of the petition or in a separate volumes not exceeding 300 pages each. The pages must be consecutively numbered;

(ii) They must be index-tabbed by number or letter, and

(iii) They must begin with a table of contents listing each document by its title and its index-tab number or letter.

(5) * * *

1 (b)-(d) ***

SPR07-04

Appellate Procedure: Petitions for Writs of Supersedeas (amend Cal. Rules of Court, rule 8.112)

	Commentator	Position	Comment on behalf of group?	Comment	Committee response
1.	Appellate Court Committee of the San Diego County Bar Association Lisa W. Cooney, Chair	AM	Y	<p>SPR07-04 proposes reforms aimed at increasing the information presented to the Court of Appeal when it considers a petition for writ of supersedeas before the appellate record is filed. These writs, when issued, can be highly disruptive. They can also significantly tilt the leverage one litigant may have against another in ongoing litigation. The proposed amendments thus seem wise—when evaluating the petition, the more information in the appellate court’s hands, the better.</p> <p>We have just a few comments. Rule 8.112(a)(4)(A) currently requires the petitioner to “attach” to the petition a number of documents, which will increase if SPR07-04 is adopted as proposed. Because attaching all the necessary documents may be unwieldy in some cases—especially under the rule as amended—we suggest modifying the rule to allow the petitioner the option to provide the documents in a separate appendix.</p> <p>In addition, if a transcript of a relevant hearing is available, we believe it makes sense, and furthers the goal of SPR07-04, to require the petitioner to submit a copy with its petition, or as soon as the transcript is available following the filing of the petition.</p>	<p>The committee agrees that, as suggested by this and other commentators, the rule should address situations in which the documents to be filed with the petition may be voluminous. The committee is recommending adding language, modeled on rule 8.490, permitting the documents to either be attached to the end of the petition or bound together in a separate volume accompanying the petition.</p> <p>Because this would be an important substantive change to the rule, the committee believes public comment should be sought before this change is considered for adoption. The committee will consider this</p>

Appellate Procedure: Petitions for Writs of Supersedeas (amend Cal. Rules of Court, rule 8.112)

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				<p>If these comments are incorporated, the rule might be amended as follows:</p> <p>Rule 8.112. Petition for writ of supersedeas</p> <p>(a) Petition</p> <p>(1)-(3) * * *</p> <p>(4) * * *</p> <p>(A) <u>Attach to the petition, or provide in an accompanying appendix:</u></p> <p>(i)-(iv) * * *</p> <p>(v) <i>A transcript, if available, of any relevant hearing in the lower court. If a transcript of a relevant hearing becomes available after the petition is filed, the petitioner must submit a copy promptly to the Court of Appeal.</i></p>	<p>suggestion during the next rules cycle.</p>
2.	<p>California Appellate Court Clerks' Association Deena C. Fawcett, President</p>	AM	Y	<p>Rule 8.112. We agree with the basic premise of this rule. We suggest the following modification in the interest of assisting the filing clerk. Modify subdivision (a)(4)(A) to read, "Attach to the petition and include in the table of contents:" Requiring a Table of Contents listing the required items makes it possible to tell at virtually a glance whether the petition complies with the basic requirements for filing. Neither</p>	<p>The committee agrees that it would be helpful to clarify that documents provided with a writ of supersedeas should be in the same format as documents provided with other writ petitions, including index-tabling the documents and providing a table of contents for these documents. The committee has incorporated</p>

Appellate Procedure: Petitions for Writs of Supersedeas (amend Cal. Rules of Court, rule 8.112)

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				<p>the filing clerk nor the court is left to guess where in the petition these documents are located.</p> <p>We also raise this question. What if the attachments to the petition are voluminous? (Proposed subdivision (a)(4)(A)(iv) invites any and all documents.) Has any thought been given to mirroring the language found in rule 8.490(c) at proposed rule 8.112(a)(4)(A), for example “Attach to the petition or accompanying the petition provide an adequate record including copies of:”</p> <p>What about adding the limitations found in rule 8.490(d)(1) as well? This would make any attachments easier for the court to handle.</p>	<p>these changes into the proposal. The committee also agrees that, as suggested by this and other commentators, the rule should address situations in which the documents to be filed with the petition may be voluminous. The committee is recommending adding language, modeled on rule 8.490, permitting the documents to either be attached to the end of the petition or bound together in a separate volume accompanying the petition.</p>
3.	Mary Carnahan Criminal Division Program Manager Superior Court of Solano County	A	N	No narrative comments submitted.	No response required.
4.	Court of Appeal Second Appellate District Hon. Roger W. Boren Administrative Presiding Justice	AM	Y	<p>We suggest that the following language be added to the proposed modification of rule 8.112(a)(4)(iii), which would then read:</p> <p>(iii) Any application for a stay filed in the trial court, and any opposition to that application, <u>and a declaration under penalty of perjury from the attorney for the petitioner, stating with specificity what occurred in the trial court with respect to the application for a stay, including</u></p>	<p>Because this would be an important substantive change to the rule, the committee believes public comment should be sought before this change is considered for adoption. The committee will consider this suggestion during the next rules cycle.</p>

Appellate Procedure: Petitions for Writs of Supersedeas (amend Cal. Rules of Court, rule 8.112)

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				<u>the trial court’s stated rationale for denying it;</u>	
5.	Pam Moraida Program Manager Superior Court of Solano County	A	N	No narrative comments submitted.	No response required.
6.	Orange County Bar Association Joseph Chairez, President	AM	Y	<p>This proposal has several problems. First the material required by subdivision (a)(4)(A), (iii) and (iv) may be voluminous. As such “attaching” them may not [be] feasible. We suggest substituting the word “accompany,” and making any necessary stylistic changes this substitution may require.</p> <p>Second, strike the words “from the trial proceeding.” Very often parties seeking supersedeas file declarations that may be necessary for supersedeas, but not necessary in seeking a trial court stay. Requiring that only documents filed in the trial court be attached unnecessarily constricts a supersedeas record.</p>	<p>The committee agrees that, as suggested by this and other commentators, the rule should address situations in which the documents to be filed with the petition may be voluminous. The committee is recommending adding language, modeled on rule 8.490, permitting the documents to either be attached to the end of the petition or bound together in a separate volume accompanying the petition.</p> <p>The committee is not recommending this change. This subdivision is not meant to identify all documents that may be included in the record accompanying a petition for a writ of supersedeas. It is meant only to identify what must be provided as a substitute for the record on appeal when that record has not yet been filed. The type of declaration noted by the commentator does not appear to be</p>

SPR07-04

Appellate Procedure: Petitions for Writs of Supersedeas (amend Cal. Rules of Court, rule 8.112)

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				Finally, proposed subdivision (a)(4)(B) is more substantive than procedural. We recommend leaving the current subdivision unchanged.	<p>a substitute for a portion of the record on appeal.</p> <p>The committee believes that it is important to provide some additional guidance concerning what needs to be addressed in a statement of the case because currently, the statement provided by the appellant/petitioner sometimes do not include sufficient information for the court to determine whether issuance of the writ is justified.</p>
7.	State Bar of California, Committee on Appellate Courts Saul Bercovitch, Staff Attorney	A	Y	<p>The Committee supports SPR07-04.</p> <p>In response to the specific request for comments on whether the term “petition for writ of supersedeas” should be replaced with the term “request for a stay,” the Committee would not support such a change. In the Committee’s view, the word “request” conveys a certain informality of procedure that is not appropriately applied to petitions for writs of supersedeas. But the Committee would support the substitution of the term “petition for writ of supersedeas” with the term “petition for a stay” as that suggested term does not suffer from the same infirmity yet it still achieves the elimination of the antiquated term “supersedeas” in favor of plain English. The</p>	<p>No response required.</p> <p>The committee is not recommending that the term petition for writ of supersedeas be changed at this time.</p>

SPR07-04

Appellate Procedure: Petitions for Writs of Supersedeas (amend Cal. Rules of Court, rule 8.112)

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				Committee notes, however, that rule 8.116 is currently entitled “Request for Writ of Supersedeas or Temporary Stay” and suggests that this title should be changed to be consistent with whatever term is used in rule 8.112	
8.	Superior Court of Los Angeles County (no name provided)	A	Y	No narrative comments submitted.	No response required.
9.	Superior Court of San Diego County Mr. Michael M. Roddy, Executive Officer	A	Y	No narrative comments submitted.	No response required.